# EXHIBIT 3

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FABRIENNE ENGLISH

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO**

| | |
|---|---|
| FABRIENNE ENGLISH<br><br>Plaintiff,<br><br>v.<br><br>APPLE INC., APPLECARE SERVICE COMPANY, INC., and APPLE CSC INC.,<br><br>Defendants. | **Case No. 3:14-cv-01619-WHO**<br>Complaint Filed: November 4, 2013<br>Transfer to N.D. Cal.: April 3, 2014<br><br>RELATED CASE: *Maldonado, et al. v. Apple Inc. et al.*, Case No. 5:16-cv-04067-WHO<br><br>**DECLARATION OF RENEE KENNEDY IN SUPPORT OF MOTION FOR RECUSAL OR DISQUALIFICATION OF DISTRICT COURT JUDGE WILLIAM H. ORRICK**<br><br>Judge: William H. Orrick<br>Courtroom: 2, 17th Floor<br>Hearing Date: Wednesday, __________<br>Hearing Time: 2:00 pm<br>Trial Date: |

I, Renee Kennedy, being of legal age, being first duly sworn, deposes, says, and declares:

1. I am the attorney for Plaintiff in this action and submit this sworn statement pursuant to 28 U.S.C. § 1746 in support of the motion for recusal or disqualification of District Court Judge William H. Orrick to establish the facts and basis for bias and prejudice. I have personal knowledge of the facts stated herein and, if called and sworn to testify, could and would testify competently thereto.

2. On October 14, 2015, the court held a certification hearing in this case concerning a proposal to pursue the litigation as a class action. I was in attendance at that hearing. A true and correct copy of relevant excerpts of that hearing transcript are attached hereto as **Exhibit A**.

3. December 14, 2016, the court held a hearing in this case concerning the Defendants' Motion for Summary Judgment. I was in attendance at that hearing. A recording of the MSJ hearing appears in the record as ECF 327. However, that transcript appeared to be inaccurate and inconsistent with the proceedings I attended and, for that reason, I hired another certified court reporter to transcribe the official sound recording found as ECF 327. A true and correct copy of the newly prepared hearing transcript, with highlighted relevant portions, are attached hereto as **Exhibit B**.

4. On July 19, 2016, the court held a Case Management Conference hearing in this case concerning scheduling and discovery concerning inspection and testing concerning the Plaintiff's cellular telephone. I was in attendance at that hearing. A true and correct copy of that hearing transcript, with highlighted relevant portions, are attached hereto as **Exhibit C**.

5. On March 3, 2015, I attended the deposition of Nicholas Pozderac. A true and correct copy of excerpts of that deposition transcript are attached hereto as **Exhibit D**.

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on: February 8, 2017

RENEE KENNEDY

# EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

ADKINS, et al., )
)
Plaintiffs, )
)
vs. ) No. C 14-01619-WHO
)
APPLE, INC., et al., )
)
Defendants. )
________________________________)

San Francisco, California
Wednesday, October 14, 2015

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 3:14 - 4:05 = 51 MINUTES

APPEARANCES:

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(APPEARANCES CONTINUED ON NEXT PAGE)

Again, Ms. English got a new phone, and also there is no common course of conduct shown in the evidence.

Fourth, Apple misrepresents in service plans that replacement iPhones will be new or equivalent to new. Again, Ms. English got a new phone, and she didn't rely on the service plans in purchasing the iPhone. I don't understand the theory of vicarious reliance.

And then, fifth, Apple fraudulently omits that replacement phones may be -- may be refurbished. Again, Ms. English got new phones, but there's insufficient evidence of uniformity of conduct.

And then I'm also interested -- it's not clear to me from the briefing -- maybe it should be -- whether Ms. English received the document that was called "Genius Bar Work Authorization and Service Confirmation" when she purchased the February 13th Apple Care Plus, but -- but that refers to new or refurbished parts or products.

So I have trouble with those theories. I have real trouble with the adequacy of class counsel and not you, Mr. Cutter, but the way that this case has been litigated from the get go has been very troublesome. The -- the fact that the Plaintiffs received gifts, the first Plaintiffs received gifts from Ms. Kennedy before they bought their phones, Ms. Kennedy's substantial involvement with buying Apple products, the fact that five -- all the original Plaintiffs

THE COURT: Ms. Kennedy had I think five or six other lawyers before you. So --

MR. CUTTER: Well, I certainly, you know --

THE COURT: I'm glad to see you.

MR. CUTTER: Thank you, your Honor. I'll address it this way, in two ways. First of all, in my review of the work that's been done, there's been a lot of solid work done with a lot of diligence by a person, you know, making their first foray into this level of litigation against this level of opposition, and -- and really, you know, a little bit of David versus Goliath struggle. And so I appreciate and I honor that work.

The second point I'll bring to bear is that we're in this case. We're committed to it. We're going to see this case through. We feel -- I like the case. I think the merits are -- are strong and that we're used to these fights, you know. I -- I just in the past year have finished a case in front of Judge Selna where I was co-lead in a medical device case involving 1,000 claims. I've been on steering committees. I've been, you know, appointed co-lead in MDL matters. I understand the scale, and I understand the complexity. I'm used to litigating. I have a case going to trial in Santa -- in San Jose next month against both Skadden Arps and Robie Matthai, a certified class action against State Farm. So it's the kind of fight

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

Echo Reporting, Inc., Transcriber

Thursday, February 11, 2016

# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| FABRIENNE ENGLISH, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, | ) |
| PLAINTIFFS, | ) |
| VS. | ) C.A. NO.: 14-CV-01619 WHO |
| APPLE, INC., APPLECARE SERVICE COMPANY, INC., AND APPLE CSC INC., | ) |
| DEFENDANTS. | ) |

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VOLUME 1 OF 1
TRANSCRIPT OF DIGITAL AUDIO RECORDING
WHO_12-14-2016.wma
DECEMBER 14, 2016

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TRANSCRIPT OF DIGITAL AUDIO RECORDING

WHO_12-14-2016.wma of proceedings before the HONORABLE WILLIAM H. ORRICK on the 14th day of December, 2016.

00:10 MS. KENNEDY: Okay. Thank you, Judge.

00:10 Okay. So while we're on this subject, I -- I would like the Court -- and I'm not -- I'm so sorry. This is my first time going through this exercise, so I apologize, but does everybody have access to the document to view it at the same time as I do, Mr. Gabriel Tapia's declaration or his exhibit, the attached exhibits, any of the things that I submitted to the Court?

00:10 THE COURT: The -- we might, but I -- I think I've got it here. But go --

00:10 MS. KENNEDY: Okay.

00:10 THE COURT: Why don't you go ahead and -- and argue. Tell me -- tell me what you think I ought to be looking at.

00:10 MS. KENNEDY: Well, inside -- may I pull it out for my own reference, Your Honor --

00:10 THE COURT: Oh, of course.

00:10 MS. KENNEDY: -- what I'm talk -- okay. Thank you.

00:11 Judge, this is ECF 232-12. It's sealed. Am I allowed to go ahead and argue from it even though it's sealed and we're in open court?

00:11 THE COURT: Well -- ah.

00:11 MS. KENNEDY: Because I -- I'm -- I'm kind

00:11 of in a bind if I can't point out the language that is
00:11 important.
00:11 THE COURT: Why -- why don't you point me to the paragraph. So I've got it. I'm -- it's in front of me now. What -- what's your -- tell me where you're going, and then we'll see whether there's an issue with respect to sealing. Go ahead.
00:11 MS. KENNEDY: Well -- okay. So under "Trigger Notes."
00:11 THE COURT: Which para --
00:11 MS. KENNEDY: It's --
00:11 THE COURT: (Unintelligible) --
00:11 MS. KENNEDY: -- page 2.
00:11 THE COURT: -- paragraph? Okay.
00:11 MS. KENNEDY: Page 2. The way that the document is set out, Your Honor, it doesn't really have paragraphs. It's like a form, and it says "Summary," "Details." It's along the edge on the left-hand side. It -- it's 232-12. It's a form. It's not really --
00:12 THE COURT: Oh, I don't actually have that. I'll pull it up, if I can. Okay. 232-12.
00:12 MS. KENNEDY: Yes, sir.
00:12 THE COURT: Usually counsel bring copies --
00:12 MS. KENNEDY: Sure.
00:12 THE COURT: -- (unintelligible).

THE COURT: That would be helpful, Ms. Patel.

Okay. Now I'm with you.

MS. KENNEDY: Okay. So it talks about, "Does the device pass" -- oh --

MS. PATEL: And I'm sorry, Your Honor.

MS. KENNEDY: -- some sort of thing.

MS. PATEL: If I could interject. We have asked the Court to seal the notes in that box, which was the question that Ms. Kennedy started reading.

THE COURT: Okay.

MS. PATEL: It's subject to the current sealing request, and I believe it's one the Court has previously sealed.

THE COURT: Okay. So I'm looking at this. So -- so make -- make your argument, Ms. Kennedy. I don't think you need to -- to use the specific language here, but tell me -- tell me what's relevant about this for your claim.

MS. KENNEDY: I guess what I'm going to ask the Court, as a favor to me, is if we could maybe excuse the audience, and then I'll get to speak?

THE COURT: (No audible response.)

MS. KENNEDY: Okay. So we can't talk.

THE COURT: -- courtrooms.

MS. KENNEDY: Right. Okay. So the -- the -- the que --

THE COURT: The upshot of this, why did you -- why did you bring this to my attention now? What -- tell me what -- what's important about it.

MS. KENNEDY: Kleenex. (Becoming tearful, regaining composure.) It just feels kind of odd not to be able to speak freely and be able to actually recite the exact language that I'm trying to explain to the Court. So it's talking in circles. So it's like your case is being thrown out, but you're not allowed to use the language to show, illustrate what you're trying to point out. People are sitting here that aren't necessarily -- I don't even know if they are viewing what you're viewing that may help you make this decision. And I'm just trying to do a good thing and help people, and I feel like I'm being handicapped severely in this process and being penalized to speak transparently with the Court. I'm here because I'm trying to do good, and I feel like I'm being opposed at every level. I'm trying to do good and do -- do right, and I'm being handicapped. My hands are being tied, and I don't understand why.

THE COURT: Well, Ms. Kennedy, the -- you've known for quite a long time that this document

00:16 was sealed. You have just come in right now to talk
00:16 about how important it is.

00:16 You're not being precluded from -- I -- I
00:16 am looking at it. I'm the person who's making the
00:16 decision. I can figure this out. You just have to tell
00:16 me why it matters. That's all I'm -- that's all I care
00:16 about is why does this matter.

00:16 MS. KENNEDY: Okay. Because it will show
00:16 that -- that -- that she was told exactly what she's
00:16 claiming she was told. If -- if we look at the
00:16 sentence, the first sentence that -- I'm just going to
00:17 say what starts with the word and what ends with the
00:17 word. Would that be okay?

00:17 THE COURT: That -- that's fine.

00:17 MS. KENNEDY: Okay. It starts with the
00:17 word "Does" and ends --

00:17 THE COURT: Yeah, I -- okay. So I see that
00:17 question mark --

00:17 MS. KENNEDY: There's a question.

00:17 THE COURT: -- yeah.

00:17 MS. KENNEDY: And then if -- if the Court
00:17 looks at the response to the question, then you'll
00:17 see -- you'll see a word that --

00:17 THE COURT: Yes.

00:17 MS. KENNEDY: Okay. Then if you'll look

00:17 under as to the reason, it's -- okay. If it was passing, if truly the phone had -- had -- I'm trying not to disclose anything.

00:17 So if the phone was eligible for an AppleCare Plus incident, then look at the reason that she -- that --

00:17 THE COURT: Okay. No.

00:17 MS. KENNEDY: -- the "F" word was --

00:17 THE COURT: Yes. No --

00:17 MS. KENNEDY: -- used.

00:17 THE COURT: -- I understand. So I understand that argument. So -- so it -- go ahead.

00:17 MS. KENNEDY: Well, that further supports and validates her claim because the reason that they're giving --

00:17 THE COURT: An inc --

00:17 MS. KENNEDY: Am I allowed to --

00:17 THE COURT: You -- you think it's an incident.

00:18 MS. KENNEDY: Right. It's clearly stating in this paragraph that she has no incidences.

00:18 THE COURT: I --

00:18 MS. KENNEDY: Because if she did, then it wouldn't be saying -- it wouldn't be denying her for the very reason that AppleCare Plus would be covering her.

Do you see what I'm saying?

So this shows -- this -- we don't even need Ryan's testimony. That was an added plus in case the Court wasn't convinced enough by this document on its face.

But even that alone shows and validates her claim if what -- what Apple's saying is true. They're saying she went in there and -- and just on her own said I'm not going to exercise an incident just on her own, and that wasn't the case at all. This is what happened.

THE COURT: Uh-huh.

MS. KENNEDY: You know, she went in with a device that was broken; and we -- we can see here what she was told as a result of that. Do you see what I'm saying?

THE COURT: Yes.

MS. KENNEDY: They're -- they're not consistent in what they're saying.

And then if the Court goes further down. Okay. If you go further down the page, there's a word. Am I -- it starts with an "R," and it ends with -- well, both words start with an "R" and end with an "N." It ends with an "i-o-n." It's --

THE COURT: Where -- where are -- where are you?

it's icing on the cake.

But putting that aside, we briefed this issue before the Court two years ago. We had a disagreement about whether Mr. Morrison or Ryan was the person who should be deposed in connection with six different Apple retail store employees who were deposed at the time. At that time Apple investigated and we represented to the Court and we told Plaintiff that we spoke with Ryan and Ryan told us he didn't remember the transaction. So that was two years ago.

THE COURT: I understand --

MS. PATEL: And now we're --

THE COURT: -- that. But so --

MS. PATEL: -- three years --

THE COURT: But -- but two years ago the -- the issue wasn't crystalized in the way that it is now. I didn't deal with Ryan in my order one way or the other. I just ignored him. Apple made the representation that it wasn't him, I accepted that, the discovery went on, the Plaintiffs have never accepted that, and so now we're -- we're down to whether there's a dispute of -- over a material fact about what representations were made to Ms. English at the store.

So I guess the -- the question that I have is take -- taking what Ms. Kennedy hopes to have him

00:39 jumped around quite a bit. I want to make sure that I cover what I need to cover.

00:39 No, unless the Court has questions, I think I'm going to rest on the papers.

00:39 THE COURT: All right. Thank you, Ms. Patel.

00:39 Ms. Kennedy.

00:39 MS. KENNEDY: Thank you, Judge.

00:39 So I don't believe that Plaintiffs have been afforded lots of time, Judge. We had a -- a different co-counsel involved; and while it's true that at the certification hearing they waived the desire to test at that point in time, I believe that that's conf -- they were -- they shouldn't have done that. That was a big mistake. That wasn't anything that I was aware that they were going to be doing, I wasn't allowed to speak, and I think that was a big mistake. And I feel like it was self-serving because at that point I believe they knew that the phone was missing; and in their reply brief, it's very clear in their reply brief where -- you know, which they filed, which we filed, it says that we were going to be cross-examining on that question. And then two weeks later, all of a sudden, we're waiving. It doesn't make sense.

00:40 And so I would ask the Court, you know, hearing that you cared about this issue and that it made a huge difference to you. You actually said it, and I pointed it out in ECF 304, your words. This is critical to you, whether the phone was new or not. There -- there was a lot that is based on that.

So please allow us to at least open it. I mean, they shouldn't be rewarded for dragging their feet for years for disclosing. I think if the phone was truly new, there wouldn't be any history on it so it would be pretty easy to find out the phone was new, all new parts, bingo. It took them years.

If -- I don't believe the phone is new for a minute; and I think when we open it up, we're going to find that the phone's not new and that all this is just -- isn't true, it's all based on untruth, what the -- what the Court's --

THE COURT: All right. Okay. Thank you, Ms. Kennedy.

MS. KENNEDY: And --

THE COURT: Do you have any -- any final words, Ms. Patel?

MS. PATEL: I just want to emphasize one point that I meant to make before I rested earlier, and that is whether the iPhone 4 can be opened.

As the record reflects and as Plaintiff has already argued today, when Apple was doing repairs on iPhone 4s, there were only whole-unit replacements. So if the screen could have been replaced, it -- that's the process that we would have gone through in terms of AppleCare Plus. So our -- in our reply, we have a declaration and testimony that says that you can't do the kind of opening and testing without destroying the phone, there are no screen replacements, iPhone 4s are whole-unit replacements.

And that's -- that's the only extra point I wanted to clarify.

THE COURT: All right.

MS. KENNEDY: Judge --

THE COURT: All right. Thank you.

MS. KENNEDY: And there was a point that the Court had asked me about any other damages or what-not.

She was not afforded a full two years. Ms. English should have gotten, you know, 24 months from her purchase of the phone that she -- of -- of her original purchase of the phone at the Apple Store.

THE COURT: No, I -- I -- I understand what your perspective is on the -- on the damages.

MS. KENNEDY: Because, otherwise, somebody can go out and buy a phone and --

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FABRIENNE ENGLISH, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

VS. — C.A. NO.: 14-CV-01619 WHO

APPLE, INC., APPLECARE SERVICE COMPANY, INC., AND APPLE CSC INC.,

DEFENDANTS.

VOLUME 1 OF 1
TRANSCRIPT OF DIGITAL AUDIO RECORDING
WHO_12-14-2016.wma
DECEMBER 14, 2016

I, AUDREY L. WALDROP, CSR, court-approved transcriber, certify that the foregoing is a correct transcription from the digital audio recording of the proceedings in the above-entitled matter.

I further certify that I am neither counsel for, related to, not employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.

I further certify that the transcription fee of $352.00 was paid/will be paid in full by Ms. Renee F. Kennedy.

Audrey L. Waldrop ______________________ 1/12/2017
Signature of Transcriber — Date

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# EXHIBIT C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

ADKINS, )
)
Plaintiff, )
)
vs. ) No. C 14-01619-WHO
)
APPLE, INC., )
)
Defendant. )
______________________________)

San Francisco, California
Tuesday, July 19, 2016

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 2:35 - 2:53 = 18 MINUTES

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Tuesday, July 19, 2016 2:53 p.m.

P-R-O-C-E-E-D-I-N-G-S

--oOo--

THE CLERK: Okay, Counsel. You are now hearing me through the court sound system. If you are still hearing well, if you would please identify yourselves.

MS. KENNEDY (telephonic): Renee Kennedy for Plaintiff Fabrienne English.

MS. PATEL (telephonic): Purvi Patel for Defendant.

THE COURT: All right. Good afternoon, Ms. Kennedy, Ms. Patel.

MS. KENNEDY: Good afternoon, your Honor.

THE COURT: So we are -- there are a few issues that are raised in the joint status report. So one of them is setting the schedule for the motion for summary judgment, and I think the -- it seems to me that the Defendant's schedule makes sense. Ms. Kennedy, it gives you twice the normal time I think to respond to the motion for summary judgment. So -- and it's the -- an individual case. So I think that timing should be sufficient, and it gets the hearing done before the end of the year, which I think is also a good thing. So -- so I'm inclined to adopt that as the dates for the motions.

Then with respect to discovery, again, I -- the -- I'm a little confused, and maybe, Ms. Kennedy, you can explain, but I don't know how the phones, if you could find them, would establish whether they were new or refurbished at this point in time, and it just -- it seems to me that if you have -- if there ips discovery that has not been done that is material to the merits of the motion, you should serve it on the Defendants or -- and meet and confer with them about it and then send me a joint letter as soon as you can if -- if there's disagreement about what needs to happen. But -- but if you want to explain something now, please -- about the discovery, please go ahead.

MS. KENNEDY: Judge, are you -- is this in reference to just the phone with -- or is this discovery overall as far as, for example, special interrogatories or additional -- a deposition or two type discovery or are you focusing more in on just the issue as to researching as to what -- investigating and testing as to whether the phones were indeed new or not?

THE COURT: Well, the -- the phones -- the phones were the thing that you raised in -- in your statement, but --

MS. KENNEDY: Yes, sir.

THE COURT: -- if there's -- if there are other things that -- that you think you need to do discovery on that you did not do prior to the certification motion, I don't know whether you've identified those for the Defendant and/or what the status on that is.

MS. KENNEDY: Oh, the Judge raises a very good point. Basically, thus far I think we've focused more on the verification side as opposed to the merits. However, I don't know if there's really a whole lot left to do in terms of discovery, and so I'd like to reserve the right to ask for -- if I needed additional depositions or special interrogatories, but I'm not prepared at this time to -- to give a definitive answer as to how many or any, if any, are even needed. And I might take the Court's advice with respect to at this juncture putting additional time and resources into trying to explore the issue of the phones being new or not new.

THE COURT: Ms. Patel, was there -- is there some order or thing that you're relying on to -- besides what you know occurred in discovery to assert that there should be no further discovery at this point?

MS. PATEL: Your Honor, we're relying in part on the -- the classification hearing, and we have class certification briefing, but also, as we laid out in the CMC statement, we don't have any specific discovery requests other than what's in -- I think the Court's suggestion to the extent that Plaintiff has identified specific Plaintiff intends to take, that the parties try to meet and confer and then raise that with the Court in a joint letter to the extent it's relevant to the summary judgment motion.

THE COURT: Okay. Well, let's -- let's do that. I don't want to preclude anything because we don't -- there's nothing before me to -- to look at, and I just -- I'm not conversant enough with every part of the discovery. I know that there was a lot that was done with respect to the individuals and obviously with respect to liability, but if -- Ms. Kennedy, if there is something that you think you're missing, then --

MS. KENNEDY: Yes, your Honor.

THE COURT: -- identify it. You know, file -- make -- serve a request and then sit down with Ms. Patel and see whether you can work it out, and you can't, then send me the joint letter, and we'll go from there.

MS. KENNEDY: Yes, sir.

THE COURT: All right.

MS. KENNEDY: Yes, your Honor. I just want to reserve the right to be able to, you know, get anything remaining residual, but I mean, we -- in light of the fact that we have been focusing more on certification as opposed to merits, and so I just don't want to preclude that possibility, which I don't think that I'm hearing that the Court is requiring me to preclude anything. In fact, the opposite. I feel like the door's being left open, if necessary, to proceed further. So that being the case, I don't want to just be restricted to, you know, discovery but restricted to just focusing in on the motion for summary judgment. I also want to look at potentially discovery for the trial, whatever I need in order to prove up what I need to do at trial.

THE COURT: The -- you're onto the -- you're onto that phase of -- of the case. So --

MS. KENNEDY: Yes, sir.

THE COURT: Now, the -- the next issue is whether it is -- would be useful at this point to do any ADR, and -- and the Defendants say that they're -- they're open to a settlement conference before a magistrate judge. And, Ms. Kennedy, you've just -- you've indicated that there haven't been settlement discussions to date. So what's your position with respect to sitting down and talking settlement with the Defendant?

MS. KENNEDY: That doesn't -- talking settlement wouldn't preclude my ability to move -- our ability to move forward with the trial, correct? That wouldn't --

THE COURT: That's correct.

MS. KENNEDY: That right would still -- okay. Then I always think talking is a good thing, personally. So I'm open to it.

THE COURT: Okay. Ms. Patel?

MS. PATEL: Your Honor, I -- I think a conference with a magistrate judge, if we're going to do that, is probably the best vehicle given the history of this case, and we'd be prepared to participate in good faith.

THE COURT: Okay. And I guess then the -- the question would be timing, and do you have any perspective on that?

MS. PATEL: Your Honor, this is Purvi Patel. I think it would help maybe either for the parties to meet and confer and see if we can reach an agreement on what the scope of the case is because there may be a difference there, and so I would think that we'd want to have a settlement conference around the time that we file for summary judgment.

THE COURT: Okay.

MS. PATEL: We believe that we will have their understanding between the parties as to whether things are off the table versus still on the table, and -- motions to work from in discussing the next steps for settlement.

THE COURT: All right. So -- so you'd like to do it after the motions are filed and the thinking has sharpened over what the case is about but prior to -- to any ruling?

MS. PATEL: I think that's right, your Honor. I think it would also help the magistrate judge to see the issues put to light.

THE COURT: Yeah, no doubt. Okay. So I will send this out to a magistrate judge and ask that a teleconference be set up at some point between September 23rd -- sometime after September 23rd at that person's convenience, but the briefing schedule will continue regardless, absent further order of the Court.

MS. KENNEDY: Thank you, your Honor.

THE COURT: Okay. Ms. --

MS. PATEL: Thank you, Judge.

THE COURT: -- Kennedy, are you somewhere?

MS. KENNEDY: I'm sorry?

THE COURT: Are you on the cell phone somewhere?

MS. KENNEDY: Yes, sir.

THE COURT: All right. So those were the three things that I was interested in talking about. Are there other issues that we need to deal with right now? Ms. Kennedy, is there anything else?

MS. KENNEDY: Not that -- not at this point in time, Judge.

THE COURT: Okay. Ms. Patel, is there anything else?

MS. PATEL: Nothing for Defendants, your Honor.

THE COURT: All right. So we now have a schedule through the motion for summary judgment. At the end of that, once I rule on that, we'll set a schedule for trial, which will be as -- as expedited as I can reasonably make it, assuming that the case is going on in some fashion. All right.

MS. KENNEDY: Judge, do you have some kind of time that you're looking at, like the earliest trial would be this month or that particular year? Would you have some idea?

THE COURT: Well, I will tell you that I'm going to -- I will set it in 2017, and -- but the specifics of it really will depend on what the -- what case is left, whether anybody thinks that there's any discovery that's going to -- any further discovery that's going to be necessary, what experts, if any, are going to be necessary, how long the case is going to take, those sorts of things, and I can't really sort that out until I know what's left of this case. So we'll -- we'll have a case management conference shortly after the summary judgment motions are decided, and we'll figure it all out, but it will definitely be in 2017.

MS. KENNEDY: And forgive me if this is not an appropriate question, and of course I'll withdraw it if it isn't, if the Court were to think it were to be, but if -- if the fact was the phones that Ms. English received were indeed new or not, is that something that's left up to the trier of fact or is that something that you're going to make --

THE COURT: I -- I'm -- I did not understand what you just asked, Ms. Kennedy. Could you -- it just didn't come through very clearly. Could you say that again?

MS. KENNEDY: Sure. I apologize. I asked if the fact as to whether or not the phones that Fabrienne English received were indeed new or whether they were refurbished, is that something that will be left for a trier of fact? Will they -- will they be the ones to determine that or is that something that you might remove from the case? I mean already rule on prior to --

THE COURT: If there is a -- if there is evidence of a dispute of material fact, I suppose it will go to the jury. I have to refresh my recollection on what that evidence has been to date, but so -- but if it's -- that's not a question of law typically. There may be -- it may have been determined earlier, but it's not a question of law.

MS. KENNEDY: And, again, I don't want to overstep myself, so I'll withdraw if that next question would send me in a place that it shouldn't, but -- and I apologize in advance, but is the fact that -- you know, I mean, do any of the issues -- issues surrounding like, for example, the fact that it took two years for that disclosure on the eve of the certification hearing when Apple's own attorney thought themselves that it was a refurbished -- they were both refurbished unit not carry weight or is that inappropriate to ask at this juncture? I'm just trying to get a feel for, you know, what kinds of things that the Court looks at in making that kind of a -- if we're taking Apple's word for it and yet their actions belie, you know, what they later stated. So does the Court look at all of that?

THE COURT: I think the answer to your question is now you're trying to reargue something. What won't go to the jury is an argument over how the parties conducted themselves during the litigation. What will go to the jury is what the evidence is with respect to the -- the facts that are alleged in the complaint and the answer and defenses. All right.

MS. KENNEDY: Okay. So the length of time, like the length of time that something takes -- and, again, I'll withdraw at any point. So if you tell me to stop, I'm going to end right there, believe me. I apologize if I'm overstepping, but the length of time could impact greatly because, you know, the course of litigation goes on and it runs up expenses potentially unnecessarily if you're litigating something that could have potentially been made moot early on. And wouldn't a jury in evaluating damages or credibility or the weight of things, wouldn't that hold any water as to credibility then, aside -- you know --

THE COURT: Well, Ms. Kennedy, you are, in fact, now sort of way overstepping what would be appropriate. I'm not going to give --

MS. KENNEDY: Okay. Then I withdraw the -- sure, sir.

THE COURT: Okay. I'm not going to give you any advice about how to proceed with respect to the litigation. I have laid out some things. If you intend to adduce evidence on different issues, I'm sure they'll get sorted out either on summary judgment or in motions in limine prior to trial. So we can discuss those down the road if they're appropriate. All right.

MS. KENNEDY: Okay. So in the course of trying to ascertain some maybe additional methods of ascertaining some of the testing of the phones, if there is something that I decided I want to pursue with respect to that, then I just go through the process that the Court outlined as far as earlier in terms of pointing it out, you know, meet and -- you know, meet and conferring, you know, sending it to the Court, Ms. Patel, and then meet and conferring over it and then doing a joint letter. That would be the proper channel?

THE COURT: If you have any discovery issues that you cannot resolve that have not previously been resolved, then you can bring them through the procedures that are laid out in my standing order.

MS. KENNEDY: Yes, sir. Okay. Thank you so much.

THE COURT: All right. Ms. Patel, anything else?

MS. PATEL: No, your Honor. Thank you very much.

THE COURT: All right.

MS. KENNEDY: Thank you, Judge.

THE COURT: Thank you both.

MS. KENNEDY: Thank you. Bye-bye.

(Proceedings adjourned at 2:53 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

action.

Echo Reporting, Inc., Transcriber

Monday, August 15, 2016

# EXHIBIT D

**In The Matter Of:**

*Fabrienne English, et al. v.*

*Apple Inc., et al.*

---

*Nicholas Andrew Pozderac*

*March 3, 2015*

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | | |
|---|---|---|
| FABRIENNE ENGLISH and KAREN LOWTHERT, On Behalf of themselves and others similarly situated, Plaintiff, | § | |
| VS | § | CASE NO. 3:14-cv-01619-WHO |
| APPLE INC., APPLECARE SERVICE COMPANY INC., and APPLE CSC INC., Defendants. | § | |

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ORAL AND VIDEOTAPED DEPOSITION OF

NICHOLAS ANDREW POZDERAC

MARCH 3, 2015

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(PORTIONS OF THIS TRANSCRIPT CONTAIN CONFIDENTIAL INFORMATION PURSUANT TO A PROTECTIVE ORDER ISSUED IN THIS CASE. PLEASE CONSULT COUNSEL PRIOR TO REVIEW.)

ORAL AND VIDEOTAPED DEPOSITION OF NICHOLAS ANDREW POZDERAC, produced as a witness at the instance of the PLAINTIFFS, and duly sworn, was taken in the above-styled and numbered cause on the 3rd day of March, 2015, from 10:15 a.m. to 5:04 p.m., before TINA TERRELL BURNEY, CSR in and for the State of Texas, reported by machine shorthand, at the offices of

Hartline Dacus Barger & Dreyer, 8750 North Central Expressway, Suite 1600, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

Q. "Actor with Murder Mystery Players - October 2009 to present."

A. Yes, sir.

Q. And "Assistant manager - warehouse, Fine Vine Wines August 2007 through January of 2010."

A. That is accurate.

Q. And we'll supplement that for the reporter by the end of the day, and that will be Exhibit 43.

Moving back to Exhibit 38 --

A. Got it.

Q. Okay. Request Number 4, "All documents evidencing your job title while employed by Apple, including, but not limited to, descriptions of those job titles."

Do you have any such document like that?

A. I do not have any document like that.

Q. And Request Number 5, "All documents including, but not limited to, recordings, evidence of your interactions and transactions with Plaintiff English."

Do you have any documents in your possession that would be responsive to Request for Production Number 5?

A. I do not.

Q. In preparation for your deposition on the

January meeting, the three-hour meeting, did you have the opportunity to look at any documents?

A. Yes.

Q. What documents did you look at?

A. I looked at the copy of the receipt that Ms. English had, the -- there was some technician notes that I looked at at that time, the emails that she had received from Apple in accordance to our interaction, I believe the work authorizations form and the AppleCare+ agreement email that she received.

Q. In looking at any of those documents, do you have any memory of this particular interaction that you had with Ms. English?

A. I do not.

Q. In looking at the documents, were there any additional facts that you are now able to remember that are not contained within those notes?

A. No.

Q. So you have no memory of your interaction with Ms. English; is that correct?

A. That is correct.

Q. And you have no documents, other than those documents that you reviewed in preparation for this deposition?

A. Correct.

things like that. And so I would imagine by this time next year I'll be a lead genius.

Q. Is there anybody else at any of the other stores that is competing with you for the lead genius?

A. I would imagine so. Probably. But, you know, but I'm a really good employee.

Q. Who's capable of using really long words.

A. I -- I do my best with my vocabulary.

Q. I want to go back to when you were a full-time specialist --

A. Okay.

Q. -- and the iPhone 4S just came out.

A. Yes.

Q. At the same time that it came out, AppleCare+ came out.

A. Correct.

Q. At that time, what was your understanding of what the difference between AppleCare and AppleCare+ was? I'm not -- not what is it now, at the time when it came out, what was the difference.

A. Absolutely. There was a slight price increase. The plus essentially stood for that you are now protected against accidental damage where you could get an accidental damage swap at the Genius Bar at a discounted price. You would have two accidental damage incidences within the two years of AppleCare+ to come in and get the swap at the reduced price.

It lasted the same time frame, two years from original date of purchase. Essentially, the difference was is that now you were finally protected in a systematic way against accidental damage.

Q. At the time that AppleCare+ first came out, what was the time frame in which an individual could purchase AppleCare+?

A. You were eligible for AppleCare+ at time of first purchase of the device, within 30 days of the device, or at first incident within the first year, to my understanding.

Q. What's the difference between first 30 days and first incident?

A. So within the first 30 days of buying the phone, the phone would have to still be in good condition. It would be checked out by someone on the team that all the buttons worked, there was no liquid damage, no cracks on the screen.

At first incident, that would be you'd actually come in with a damaged phone at the Genius Bar, and at that point the option was to get a phone replaced at the cost of the phone replacement, or you could bundle AppleCare+ with it, and you would get a slight deduction on the cost of the phone.

Q. At some point in time it changed that you could no longer sell AppleCare+ at the time of the first incident; is that correct?

A. That is correct.

Q. Do you know when that occurred?

A. I do believe that occurred during -- at the launch of the iPhone 5S, which would have been September 22nd, 2013, thereabouts, 21st, 22nd.

Q. And at that time that the 5 comes out, when -- what was the time frame in which you could purchase AppleCare+?

MS. PATEL: I'm sorry, did you say 5 or 5S?

A. So I said 5S. You said 5 just then.

Q. Okay. Sorry.

A. No. Sure. To answer the question that you asked, at the time the iPhone 5 came out -- the iPhone 5 came out September 21st, 22nd of 2012. At that time you could still purchase AppleCare+ at time of incident, and I still believe that was still within 30 days as well.

So phone in good condition within 30 days, at time of purchase, or at time of incident with the iPhone 5.

Q. But then when the iPhone 5S came out, that is

when the plan changed?
A. That is correct.
Q. And that was about a year later in 2013?
A. Yes, sir.
Q. So in 2013, how did the plan change?
A. You were no longer able to purchase it at time of incident.
Q. When could you purchase it?
A. At time of original retail purchase of the phone or within 30 days. At some point in time after the 5S came out, that 30-day window was extended to a 60-day window.
Q. What if you had an incident on the 55th day, could you purchase the AppleCare+?
A. No, sir. You would not be able to purchase AppleCare+ with a damaged phone.
Q. Okay. So that was the main change, is that you could not buy it with a damaged phone?
A. Correct. Within that 30 or 60-day window, the phone would have to be in good condition.
Q. Is there anything that helps you recall when that transition went from 30 to 60 days?
A. Not with any certainty. Holiday season in the iPhone 5S, I want to say by holiday season, the December, November area that change had been made.

C E R T I F I C A T E

I, TINA TERRELL BURNEY, Certified Shorthand Reporter in and for the State of Texas, certify that the foregoing deposition of NICHOLAS ANDREW POZDERAC was reported stenographically by me at the time and place indicated, said witness having been placed under oath by me, and that the deposition is a true record of the testimony given by the witness.

Review and signature by the witness were requested at the time of taking this deposition and the changes made by the witness are attached to the transcription of this deposition.

I further certify that I am neither counsel for nor related to or employed by any party in this cause and am not financially interested in its outcome.

Certified to this 10th day of March, 2015.

Tina Terrell Burney

Tina Terrell Burney, Texas CSR #2908
Expiration Date: 12/31/2016
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